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No. 95-1099

In the Supreme Court of the United States

OCTOBER TERM, 1995

BARRON J. RUSSELL AND NANCY H. RUSSELL,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the bankruptcy court acted within its discretion under 11 U.S.C. 362(d) in retroactively annulling an automatic stay, where the debtor did not object to annulment and annulling the stay would not affect the debtor's estate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is unpublished, but the decision is noted at 62 F.3d 401 (Table). The order of the district court (Pet. App. 5a-7a) is unreported. The memorandum and order of the bankruptcy court (Pet. App. 8a-17a) are reported at 156 B.R. 347.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1995. A petition for rehearing was denied on September 6, 1995. Pet. App. 1a-2a. On November 22, 1995, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and

including January 5, 1996, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, the Russell Corporation (Russell) filed a petition for relief under Chapter 11 of the Bankruptcy Code. Pet. App. 9a. At the time the petition was filed, Russell owed to First American Savings Bank, F.S.B. (First American) a debt that was secured by a mortgage on property owned by Russell and by the personal guaranty of petitioners. *Ibid.* First American moved for relief from the automatic stay. *Ibid.* As a result of that motion, a consent order was entered that required strict compliance with Russell's obligation to make payments to First American. *Ibid.* After Russell defaulted under the terms of the consent order, the bankruptcy court entered an order granting First American relief from the automatic stay. That order provided, in pertinent part:

> First American Savings is granted relief from the automatic stay with respect to the property securing its claim * * * to advertise, foreclose upon and to exercise all other remedies with respect to said property to which it is entitled under applicable law.

Id. at 10a.

2. On June 5, 1992, the Resolution Trust Corporation (RTC) was appointed receiver for First American and conservator for First American Federal Savings Bank (First American Federal), the successor to First American. Gov't C.A. Br. 5 n.1. The RTC foreclosed on Russell's property on December 1, 1992, and was the high bidder at the foreclosure sale.

Pet. App. 10a. The RTC then filed an action to confirm the sale in the Superior Court of Gwinnett County, Georgia (the confirmation action). *Ibid.*[1] The confirmation action named as respondents both Russell and petitioners, but the RTC stated that it had named Russell only in order to comply with Georgia law, and that it did not intend to seek a deficiency judgment against the debtor. *Id.* at 11a. Upon petitioners' objection, the state court stayed its proceedings and directed the RTC to seek relief from the automatic stay in the bankruptcy court. *Id.* at 10a. The RTC moved for relief from the stay, *nunc pro tunc*, and the bankruptcy court allowed petitioners to intervene in opposition. *Id.* at 9a, 12a.

3. The bankruptcy court held that the filing of the confirmation action violated the automatic stay. Pet. App. 14a. The court went on to hold, however, that 11 U.S.C. 362 authorizes courts to grant retroactive relief from the automatic stay, and that such relief was appropriate in this case. Pet App. 14a. The court reasoned that the automatic stay was designed, not to benefit third parties like petitioners, but to protect the debtor and the property of the estate. *Ibid.* Because the RTC was not seeking a deficiency judgment against the debtor, and because the debtor's trustee did not object to the retroactive annulment of the stay, the court found that only petitioners would benefit from enforcement of the stay, by avoiding their liability as guarantors. *Id.* at 15a. Concluding that Section 362 was not intended to foster that result, the court granted the RTC's motion for retroactive relief from the automatic stay. Pet App. 15a.

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[1] Under Georgia law, a confirmation action is a prerequisite to obtaining a deficiency judgment. See Pet. App. 13a.

4. The district court affirmed. Pet. App. 7a. The court agreed that Section 362 permits retroactive relief from the automatic stay. It further held that, because Congress intended the automatic stay to protect debtors, and not to allow solvent guarantors to avoid their obligations, the relief granted by the bankruptcy court was appropriate. Pet App. 7a.

5. The court of appeals affirmed in a per curiam order for the reasons stated by the bankruptcy and district courts. Pet. App 4a.

ARGUMENT

Petitioners urge this Court (Pet. 5-7) to grant certiorari in order to resolve a conflict among the circuits concerning whether actions taken in violation of the automatic stay provided in 11 U.S.C. 362 are void *ab initio*, or merely voidable. That question, however, did not control the outcome in this case. While courts have frequently articulated the general proposition that actions violating the automatic stay are "void," they have consistently gone on to hold that bankruptcy courts have the discretion to validate such actions, in appropriate cases, by retroactive annulment of the stay. See, *e.g.*, *In re Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994) ("Pursuant to section 362(d), the bankruptcy court had authority to grant an annulment of the stay. If it had done so, the post-petition sheriff's sale would have been validated as an exception to the void *ab initio* rule."); *In re Schwartz*, 954 F.2d 569, 571-572 (9th Cir. 1992) (finding violations of the automatic stay to be "void, not voidable," but concluding that "section 362 gives the bankruptcy court wide latitude in crafting relief from the automatic stay, including the power to grant retroactive relief from the stay"); *In re Albany Partners, Ltd.*,

749 F.2d 670, 675 (11th Cir. 1984) ("It is true that acts taken in violation of the automatic stay are generally deemed void and without effect. Nonetheless, § 362(d) expressly grants bankruptcy courts the option, in fashioning appropriate relief, of 'annulling' the automatic stay, in addition to merely 'terminating' it.") (citations omitted).[2] See also 2 L. King, *Collier on Bankruptcy* ¶ 362.07 (15th ed. 1995). Because the bankruptcy court granted retroactive annulment in this case, the relevant question is whether the court of appeals properly affirmed the bankruptcy court's exercise of its discretion.

Petitioners are correct in suggesting (Pet. 7-8, 10) that the most commonly cited basis for annulment—a creditor's lack of awareness of the automatic stay—is absent here. They are mistaken, however, in contending (Pet. 8-11) that no other equitable basis supports the decision below. The bankruptcy court invoked its equitable powers to grant relief, *nunc pro tunc*, in this case because retroactive annulment would not affect the debtor's estate, and because enforcing the stay would have served only to relieve petitioners of their guaranty obligations. Pet. App. 15a.[3] Petitioners cite no case, and we are aware of

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[2] Petitioners' contention (Pet. 5) that the decision below is inconsistent with the Eleventh Circuit's prior decision in *Albany Partners* does not merit further review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (intracircuit conflict does not generally warrant Supreme Court review because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties").

[3] Petitioners' reliance (Pet. 9) on *Franklin Savings Ass'n* v. *Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir. 1994), is misplaced. In *Franklin Savings Ass'n*, the creditor sought relief from the automatic stay in order to pursue a claim of court

none, in which a court has concluded that such considerations cannot support annulment of an automatic stay.

Petitioners demand, in essence, that the RTC's rights against them be denied as a sanction for violating the stay. Pet. 10. The district court correctly rejected that argument, holding that "[petitioners'] nebulous allegations of RTC misconduct do not undermine the logic" of the bankruptcy court's decision. Pet. App. 7a. Petitioners have no right to the protection of the automatic stay because their claim for relief lies far outside the zone of interests that Congress intended Section 362 to protect. See, *e.g.*, *Otoe County Nat'l Bank* v. *W & P Trucking, Inc.*, 754 F.2d 881, 883 (10th Cir. 1985) (automatic stay does not extend to guarantor of debtor); *In re Veeco Investment Co.*, 157 B.R. 452 (E.D. Mo. 1993) (bankruptcy court would not use its equitable powers to benefit guarantor of debtor); *In re Tulane Hotel Investors Ltd. Partnership*, 82 B.R. 826, 828 (E.D. La. 1988) (stay provisions are for benefit of debtor; nullification of state court judgment would neither benefit debtor's estate nor further purposes of Bankruptcy Code).

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costs against the debtor. *Id.* at 1022. Thus, unlike in this case, retroactive relief from the automatic stay would have adversely affected the debtor's estate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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